Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996 Open Video Systems	))))))	CC Docket No. 96-46

To: The Commission

NYNEX REPLY COMMENTS

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SUMMARY OF COMMENTS

This proceeding presents the Commission with its best opportunity to encourage the development of wireline competition to the CableCo-dominated video services marketplace. By clear legislative action and direction Congress has made possible the provision of Open Video Systems which will accommodate both affiliated and unaffiliated programmers and offer consumers a choice they lack today. The public interest benefits in OVS, which go far beyond those of cable systems because OVS is "open," are obvious and substantial.

In providing for Open Video Systems, Congress also established the manner in which OVS should be regulated, rejecting the Title II constraints that ultimately dimmed the once-bright prospects for Video Dial Tone (VDT), and carefully sorting through the Title VI "cable service" requirements that do and do not apply to OVS. In the NPRM which initiated this proceeding, the Commission thoughtfully worked within the Congressional scheme. It also demonstrated a clear understanding of the importance of preserving flexibility in technical development and commercial terms that must be afforded OVS for such systems to be built. The importance of this approach can be simply stated: if OVS is not made an attractive means of providing video services, wireline competition will come, if at all, only from cable system "overbuilders"--and there is no history of such overbuilding.

For all of these reasons the Commission must use a light regulatory hand in this proceeding to foster, rather than impair, the prospects for the successful development of OVS. Unfortunately, numerous parties have presented the Commission instead with very heavy-handed regulatory proposals which, if adopted, will likely kill OVS as they did VDT.

To begin, the CableCos seek literally dozens of front-end prohibitions and prescriptions that will burden and sink the business prospects of prospective OVS operators. Only the most egregious of these are set forth and addressed in Section I, but others could have been recounted at length to the same effect. The short answer to such proposals is that the Commission should reject them as designed by threatened monopoly providers to destroy the prospects for wireline video competition. Similarly, MCI (which is heavily invested in DBS) proposes to resurrect all of the VDT regulatory accounting and ratesetting provisions of Title II -- provisions the Congress repealed in an extraordinary specific legislative action. Simply stated, there is no merit to these proposals.

Programmers and broadcasters, on the other hand, welcome the opportunities that OVS would provide for them to reach new and existing customers through an alternative wireline competitor. Nevertheless, they ask the Commission to establish various detailed, front-end requirements for OVS which will stifle technical innovation and preclude necessary commercial flexibility. The Commission should not follow this path. These entities also seek

Commission authority to discriminate against the OVS operator and participants with respect to program access agreements and "must-carry" elections/ "retransmission consents." If countenanced by the Commission, these practices will gravely impair OVS market entry and any incentive for either OVS investment or participation (Section II).

Finally, various municipal parties ask the Commission to impose conditions and requirements on the OVS providers which go far beyond those` requirements carefully selected by Congress. The law provides for payments in lieu of franchise fees, and the Commission should resist efforts to impose "franchising" indirectly. The local exchange carriers that are considering the provision of OVS have decades of experience working with municipal governments in areas of right-of-way administration (e.g., street openings, facility placements). This will continue. In all other areas of economic regulation and OVS system design and regulation, however, Congress has preempted franchising authorities to ensure that OVS has a reasonable prospect for success (Section III).

NYNEX is hopeful that this rulemaking will follow the flexible regulatory course outlined in the NPRM, and result in the implementation of OVS by NYNEX and others.

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NYNEX Corporation ("NYNEX") hereby submits its Reply Comments in response to the Comments of other parties filed April 1, 1996, in this proceeding. In our Comments, NYNEX urged the Commission to give open video system ("OVS") operators maximum flexibility to design their systems and offer video services in a manner responsive to the marketplace. NYNEX pointed out that open video systems have no market share and must compete with entrenched CableCo competitors that have established program supplier relationships and vast customer bases. The Commission itself has reported that CableCos serve 91.4 percent (61.7 million of 67.5 million) of the households subscribing to MVPDs ("Multichannel Video Program Distributors"), and that there is no "competitive market ... for the delivery of video programming."[1]

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[1] "Second Annual Report on the Status of Competition in the Market for the Delivery of Video Programming", FCC 95-491, released December 11, 1995 ("Second Annual Report") at ¶ 9.

To promote competitive entry in these circumstances, Congress instructed the Commission to "encourage" the development of OVS services.[2] Also, because no one yet has a firm or comprehensive picture of the technologies that may be used to deliver these services, or their feasibility or marketability, the Commission should refrain from adopting rules which constrain technical innovation and system variation. And, Congress has facilitated the Commission's ability to follow exactly this path by: (1) repealing all of the Commission's video dialtone rules and policies;[3] (2) establishing OVS service outside of the Title II regulatory scheme whose weight of regulation and accounting rules ultimately killed Video Dial Tone ("VDT");[4] and (3) enacting a new Part V of Title VI for this service, thus concurrently setting new requirements for the accommodation of non-affiliated programmers and determining specifically which other provisions of Title VI (Parts I-IV) should *and should not* be applied to OVS.

NYNEX commends the Commission for thoughtfully following these Congressional judgments in the NPRM. Therein, the Commission appears to recognize that the development of OVS represents its best opportunity for broadscale wireline competition. The same thoughtful approach must be applied in weighing commenter proposals. Specifically, numerous commenters urge the Commission to adopt a plethora of new rules and regulations which, if adopted at the front-end of OVS implementation,

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2 H.R. Rep. No. 458, 104th Cong., 2d Sess. 113 (1996)("Conference Report") at 178.

3 Communications Act § 302 (b) (3).

4 Instead, the 1996 Act directs the Commission to adopt streamlined regulations of open video systems "in lieu of, and not in addition to, the requirements of Title II." Communications Act § 653 (c) (3).

will so encumber OVS with prohibitions and requirements that such systems will likely never be built. As addressed below, there are neither sound legal nor policy bases for the Commission to adopt these proposals.[5] Perhaps more importantly, the resulting death of the OVS concept would represent a real injury to the public interest.

I. TITLE-II TYPE REGULATORY BURDENS ARE INCONSISTENT WITH SECTION 653 AND CONGRESS' DESIGN FOR OVS

A. The Commission Should Reject Proposed Burdens Which Vitiate The Attractiveness of OVS

Congress recognized when it enacted Section 653 of the Act that the rigid and burdensome VDT rules required by Title II caused the demise of that promising means of introducing wireline competition to the established CableCos. Thus, it wisely directed the Commission to discard the Title II approach and employ a new, streamlined regulatory approach codified in Section 653.[6] The CableCos, joined on some issues by state and local governments ("local governments"), would have the Commission ignore that clear Congressional directive. Through the guise of assuring that OVS operators charge "just and reasonable" rates and do not "discriminate" against programming providers, they

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[5] In addition, it would be grave error for the Commission to ignore the fundamental fact that CableCo commenters wish to extinguish the vitality of the OVS concept so as to force any prospective wireline competitor to "overbuild" its systems. As it deliberates on each of these suggestions, the Commission must -- as the cable industry knows -- be mindful that there is no history of successful overbuilding; now, the prospects for success in such ventures is even more daunting because the 1996 Act deregulates the pricing of the entrenched incumbent CableCo with the advent of any video services competition in its markets.

[6] The Conference Committee acknowledged that application of Title II to video distribution had "served as an obstacle to competitive entry and [had] disproportionately disadvantaged new competitors. Eliminating this barrier will hasten the development of video competition and will provide consumers with increased program choice." Conference Report at 173.

propose that the Commission impose a host of Title II-type regulations on OVS operators. They urge inter alia that the Commission adopt regulatory measures that:[7]

-- Require local exchange carriers ("LECs") to create a separate subsidiary to operate any open video system;

-- Apply revised Part 64 rules and Cost Allocation Manual ("CAM") requirements to OVS operations (and to former VDT operations, retroactively) and adopt any changes to those before the Commission accepts OVS certifications;

-- Require LECS to obtain approval of revised CAMs before they submit their OVS certification, and to certify that projected revenues will cover the long run incremental costs of providing service;

-- Adopt "specific, enforceable requirements" implementing the nondiscrimination provisions of Section 653(b), including the following:

  - that the OVS operator set forth procedures to decide how channel positions will be allocated and channel positions assigned, or require OVS operators to employ a channel administrator, selected by all of the open video system's programmers; and

  - that part-time users be accommodated;

-- Require that shared channels be administered by a third party, or that all programmers using the open video system participate in selecting the programming on shared channels:

-- Prohibit LEC-affiliated OVS operators from offering bundled OVS and telecommunications services, or engaging in joint marketing of OVS and telephone services until others are offering competitive services in the

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[7] These proposals were made in the Comments of the following CableCos or their representatives: the National Cable Television Association, Time Warner Cable, Continental Cablevision, Inc., Tele-Communications, Inc., Comcast Cable Communications, Inc., Cox Communications, Inc., Cablevision Systems Corporation and the California Cable Television Association. Similar proposals were advanced by a number of state or local governments including the National League of Cities, the Commonwealth of Pennsylvania; the Texas Cities and others.

market or, in the alternative, require LECs to disclose the offering of "all OVS lessees" on an equal basis;

-- Ensure that all video programmers on the open video system have access to the same customer information on a real-time basis; and

-- Apply a letter-perfect standard to certifications, such that the Commission could deny certification for a technical inconsistency in the certification filing.

These proposals would in substance reimpose the overly regulatory regime that Congress instructed the Commission to avoid[8] and destroy the attractiveness of OVS. These proposals derive from the Commission's VDT and *Computer II* regimes.[9] Both those regimes have been rejected -- the first by Congress alone, and the second by both Congress and the Commission. Both proved overly regulatory and unduly burdensome, serving to deprive the public of the benefits of economies-of-scale and stifling innovation.[10] It would be foolish to resurrect these requirements here and impose them on a service Congress intended to make attractive so as to encourage entry by LECs and others.

As the Commission acknowledges in its NPRM, Congress recognized that OVS operators would have to have freedom "to tailor services to meet the unique competitive

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8 The assertion by the National League of Cities et al. that Section 653 creates two different services, one analogous to a cable system and the other subject to Title II-type regulation, cannot be reconciled with the clear language of Section 653(c)(3) that Title II shall not apply to the "operation of an open video system."

9 The cable companies consistently cite to the video dialtone decisions and to Computer II in attempting to justify these burdensome and onerous regulations. *See, e.g.*, Cablevision 7-9 n. 22-24, 13 n.43, 17 n.55; TCI 9-10.

10 *See Third Computer Inquiry*, 104 FCC 2d 958 (1986), *on recon*, 2 FCC Rcd 3035 (1987), 2 FCC Rcd 3072 (1987), *on further recon* 3 FCC Rcd 1135 (1988); 3 FCC Rcd 1150 (1988); *aff'd. in part and rev'd in part, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), 5 F.2d 919 (1994).

consumer needs of individual markets"[11] to make OVS attractive to investors. That requires that the OVS operator have flexibility to manage and operate the open video system in a manner it believes will attract consumers.[12] Congress manifestly did not intend that OVS operators should be passive providers of video distribution capacity. Yet, requiring OVS operators to employ a separate subsidiary, limiting their ability to allocate channels and make decisions concerning the sharing of capacity, obligating them to publish rates and to charge the same rates to all participants, prohibiting them from joint marketing of telecommunications and OVS services, and the other constraints suggested by the CableCos would render the OVS operator just such a passive carrier.[13]

Moreover, the proposals advanced by the CableCos and others are not essential to assure compliance with the nondiscrimination and rate regulations requirements of Section 653, as the CableCos contend.[14] The nondiscrimination and reasonable rate

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[11] Conference Report at 177.

[12] NCTA, TCI and others argue that, since the non-discrimination provision of Section 653(b) is not qualified, OVS operators may not deny incumbent local cable companies access to OVS capacity. The cable companies misread the Act. While the prohibition against discrimination in Section 653(b)(1)(A) is not qualified, that section must be read in the context of the Act as a whole, and Section 653(a)(1) provides that such access shall occur only "to the extent permitted by ... the Commission . . . consistent with the public interest, convenience and necessity . . . ." Thus, the Commission has the authority to adopt competitive safeguards that permit OVS operators to deny occupancy to incumbent cable operators, and should do so (NYNEX 11-12).

[13] TCI argues that Section 272(a)(2)(C) requires Bell Operating Companies employ a separate subsidiary to operate an open video systems since OVS is an interLATA information service (TCI 16). TCI misreads the Act. Section 653(c) specifically provides that Title II will not apply to OVS and Section 272(a)(2)(C) is part of Title II. *See* Act, Section 151. Thus, Section 272(a)(1)(C) is not applicable to OVS. However, even if Title II did apply, any interLATA OVS would fit within the incidental interLATA provisions applicable to the distribution of video programming and other programming services (Section 271(g)(1)), for which Section 272 does not require a separate affiliate.

[14] *See. e.g.*, Cablevision 6: NCTA 4-5; Time Warner 18-19; Continental 3-7.

requirements were intended, as the Commission stated, to assure that non-affiliated programmers have "fair access" to open video systems (NYNEX 9-11). General rules incorporating the non-discrimination and reasonable rate requirements of Section 653, coupled with a dispute resolution mechanism, will assure that the goal of fair access is realized, and will do so in a manner that satisfies Congress' directive to subject OVS operators only to streamlined regulation. Heavy-handed, "before-the-fact" prescriptive and prophylactic rules such as these suggested by the CableCos are neither necessary nor desirable.[15]

B. The Commission Must Refrain From Establishing Burdensome Accounting And Rate Regulations

In addition to these requirements, others suggest that the Commission resurrect -- in whole or in part -- VDT and other Title II-like reports and regulations governing rates.[16] The Commission should summarily reject such proposals.

Perhaps the most egregious of these proponents is MCI. To begin, MCI asks the Commission to "reinstate the accounting classifications, subsidiary records, amendments to cost allocation manuals and other reporting requirements adopted in RAO Letter 25, and the Reporting Requirements Order." (MCI 7-8). Adoption of this proposal would fly in the face of Congress' directive to employ streamlined regulation

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[15] In contrast, the "Proposed OVS Rules" attached as an Appendix to the filing of Bell Atlantic et. al reflect the appropriate level of relaxed regulation suitable for the introduction of OVS.

[16] See, e.g., NARUC 5-7.

and take the Commission backward into Title II regulation, rather than forward into marketplace competition.

MCI next requests that the Commission order the filing of tariffs by OVS providers "for their OVS services accompanied by the supporting documents required under the Commission's existing tariff procedures" (MCI 9). There are no tariff procedures applicable outside of Title II and, as above, Congress specifically eliminated the application of Title II to OVS services. Further, there is no logic for the proposal because even the rates of the entrenched cable operators will be deregulated upon the advent of OVS. At a time when the Commission is actively contemplating eliminating many federal tariffs completely because of their anti-competitive effect,[17] and Congress has instructed the Commission to rely on competition over regulation, these proposals to tariff OVS services deserve short shrift.[18]

Finally, MCI argues that detailed rate regulation is necessary because the market for wholesale video services is not competitive (MCI 4-5). MCI is correct about the market, because the current combined wholesale/retail market is controlled by monopolistic cable

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[17] In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Notice of Proposed Rulemaking, CC Docket No. 96-61, FCC 96-123 at ¶¶ 17-39.

[18] Similarly, proposals that OVS operators be required to file their contracts with the Commission should be summarily rejected as overly regulatory (see, e.g., Rainbow 5). Such a requirement would be functionally equivalent to the Title II tariffing requirement that should be reserved for dominant carriers, not new entrants in a competitive market. The Commission has specifically recognized that the compelled disclosure of sensitive business information is not good policy. In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation; Leased Commercial Access, Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking; MM Docket No. 92-266 and CS Docket No. 96-60, FCC 96-122 (released March 29, 1996) at ¶ 60.

systems operators. However, the provision of OVS will open such markets to the forces of competition. These market forces, not the detailed regulation favored by MCI, are the best means to ensure competitive rates.[19] Thus, at its heart, MCI's proposed rate regulation rests entirely on the a priori assumption of OVS operator misconduct in unlawfully discriminating in favor of affiliated programmers. The Commission should not begin with this speculative premise and risk foreclosing OVS as a competitive option. Rather, the Commission should let the marketplace develop and act only as experience proves necessary. Certainly, an "ounce" of experience here is worth far more than "pounds" of speculation.

C. The Commission Should Reject AT&T's Prohibition On The "Bundled" Sale Of Telephone Services

AT&T argues that the OVS operator should not have the ability to sell local telephone and OVS services as a "bundled package" (AT&T 2-4). It cites as authority the Commission's rules with respect to the unbundling of customer premises equipment ("CPE") (Id. 3). AT&T's proposed constraint, that "the Commission should prohibit the bundling by open video system operators of non-competitive services with their competitive offerings," should be rejected as contrary to the judgment of Congress and, in fact, the Commission's own policies. That is, Congress has not barred the sale by OVS operators of telephony services, and it has decided that the "safeguard" of a

[19] It is noteworthy that Metropolitan Fiber Systems, a strong competitor of incumbent local exchange carriers, firmly supports this view (MFS 8-14).

separate subsidiary is not necessary (Section 272 (a)(2)). Further, Congress has set forth both the requirements and procedures for the unbundling and resale of telephone services (Sections 251 and 252) to address precisely the competitive issues that AT&T seeks to raise here. Moreover, the Commission itself has regarded Computer II CPE rules as economically inefficient, and they should not be extended without strong reason. Finally, such rules would be contrary to Congress' admonition to eschew Title II type regulation (NPRM ¶ 15).

For all of these reasons, AT&T's proposed "prohibition" should not be adopted.

II. GENERAL PRINCIPLES OF NON-DISCRIMINATION SHOULD GOVERN ARRANGEMENTS BETWEEN THE PARTIES

Many broadcast, programmer and consumer commenters support the advent of OVS and urge that the Commission encourage development as the first real prospect for competition to incumbent CableCo systems.[20] However, while many lament the loss of similar "early period" enthusiasm for VDT systems, they now urge rigid new regulations which are both unnecessary for, and detrimental to, the development of a competitive OVS alternative. Ironically, as these programming entities express concern for even-handed treatment on the OVS, they seek for themselves the authority to discriminate against the OVS operator and others also on the OVS. It would be far better for the Commission to let OVS develop under general principles of non-discriminatory conduct on the part of the OVS participants, as well as the OVS operator.

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[20] See, e.g., CBS 2.

A. Adoption of Detailed Commercial Requirements Would Unduly Constrain OVS Technical Innovation And Flexibility

1. OVS Rate Structure

To begin, Commenters unanimously welcome the prospects for competitive signal carriage that OVS services may make available. For example, RCN advises that "[a]s an emerging company which plans to provide a diverse package of video and telephone services to end users, it looks forward to having OVS networks available as a means to distribute video programming to its subscribers."[21] From this auspicious start, commenters diverge in all directions as they ask the Commission to adopt rules which will favor their particular interests. Thus, the Community Broadcasters Association argues that rates "should be equal for all programmers" (emphasis in original), while the joint "consumer parties" argue as vigorously for preferential rates for "not-for-profit" programmers.[22] Others state more simply that carriage rates should be "cost-based," then argue for ratesetting by the Commission in accordance with their individual interests.[23]

In fact, the Commission is best advised to let the interests of the parties shape the forces of the marketplace and let negotiations determine appropriate rate structures and

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[21] Residential Communications Network 2.

[22] CBA 5; contra, Alliance for Community Media, et al. 20-21.

[23] For example, Home Box Office asserts that the "lower costs" of providing digital capacity should be reflected in OVS digital rates below analog rate levels (HBO 20-22). Not only is there no record basis for this conclusion, but it also ignores entirely the commercial reality that HBO charges for its programming based on marketplace demand, not on its "costs."

levels in the first instance, subject to review by the Commission upon complaint (NYNEX 22-24). Here, we concur completely with the views expressed by Access 2000 (a membership organization of independent film, television, video and new media providers):

> "The Commission asks whether or not it is permissible for OVS operations to charge different rates to different categories of video programming -- e.g., not-for-profit programmers, home shopping programmers, or pay per channel or pay-per-program programmers. Allowing OVS operators to charge different rates for different categories of programming is permissible and in the public interest. We believe that within each of these categories the Commission should require that rates for carriage be "just and reasonable and ... not unjustly or unreasonably discriminatory," but that between categories, the OVS operator should have a fair degree of latitude" (citation omitted).[24]

2. Analog Capacity

Some commenters ask the Commission to compel the provision of analog services to broadcasters, while others ask the Commission to compel the carriage of both digital (HDTV) and analog signals.[25] The former effectively ask the Commission to require all OVS providers to provide analog channels. Neither the Act nor the Commission have proposed to constrain system design in this manner, likely in recognition that evolving technology may lead economically to wholly digital OVS (NPRM ¶ 18).

NYNEX urges the Commission to hold to that position. If the OVS concept is to be realized, OVS operators must have the full flexibility to deploy new and evolving

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[24] Access 2000 4-5.

[25] NAB 15-16.

technology. Thus, the Commission should not require that programming "be available in analog format on the OVS system,"[26] or for that matter, in a digital format. The OVS operator must remain free to develop its system in a manner that best suits the operator's business plans for the particular market. Neither should the Commission determine in this proceeding the "must-carry" rights of broadcasters with respect to their digital service offerings. As the proponent NBC itself concedes, those issues are already pending decision in the ATV proceeding.[27]

3. Network Non-Duplication, Syndicated and Sports Exclusivity Responsibilities

Commenters favorably note the legislative determination to make network non-duplication, syndicated exclusivity and sports exclusivity applicable to OVS.[28] Many go farther, however, by urging that the OVS operators be responsible for compliance with these rules, even as to unaffiliated programmers on the OVS.[29] The convenience of these parties does not provide a reasonable basis for placing this responsibility on the OVS operator. Certainly, the OVS operator should be responsible for compliance on the "must-carry" channels and on operator or affiliate program channels. But, as MPAA recognizes, with respect to programming distributed by unaffiliated programmers, these

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[26] Capital Cities/ABC p. 6. Practically speaking, however, the great consumer appeal of broadcast channels will likely lead OVS providers of wholly digital systems to negotiate for the conversion of such signals to digital format for transmission.

[27] NBC at 10, n. 22.

[28] See, e.g., NAB 10-12.

[29] ALTV 10-12; NAB 11; NBC 16.

unaffiliated programmers should be required to assure compliance.[30] In these circumstances the OVS operator may perform the ministerial task of "blacking-out" the programming at issue, but the unaffiliated programmer has the legal responsibility for preventing its showing.[31] Indeed, these unaffiliated programmers may decide in such circumstances to offer alternative programming, which the OVS operator cannot provide.

B. General Principles of Non-Discrimination Should Also Apply to Programmers And Broadcasters on OVS

Notwithstanding their views on OVS "discrimination," broadcasters and programmers seek to establish for themselves the right to discriminate against others on the OVS. Thus, broadcasters claim the right to elect (or deny) "retransmission consent" against OVS providers on different terms than they require of CableCos in the same operating area, or even where they elect "must-carry" status on the incumbent CableCo system.[32] Given the CableCo's ability to use its vast market power and nearly 100 percent market share to exact more favorable terms, this power to discriminate can be expected to tilt substantially, and perhaps irreparably, the competitive balance against the OVS provider. There is no reason for the Commission to countenance such unfair conduct, particularly where Congress has said that the "new entrant" is entitled to its support (NPRM ¶ 6). Indeed, because the thrust of both the CableCo and OVS operator's "must-carry" obligations are to enable broadcasters to require household coverage in a

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30 MPAA 12; see, NYNEX Comments 18.

31 Only in this sense is compliance a "joint responsibility," as stated by Capital Cities (CC/ABC 11).

32 See, e.g., NAB 16.

specific Area of Dominant Influence ("ADI"), the Commission may reasonably require that a consistent determination be made -- and equal terms be offered -- to all side-by-side competitors within an ADI.[33]

Similarly, programmers seek to establish the right to discriminate in the offer -- or refusal to offer -- their program content to others on the OVS as they see fit.[34] Like the broadcasters' position, this asserted "right" threatens to diminish any interest in OVS investment. Clearly, if one participant on the OVS (e.g., an out-of-region CableCo) can use its market power elsewhere to secure independent programming for its use on the OVS on a preferential or exclusive basis, the incentive for LECs or new entrants like MFS to construct OVS will be severely diminished. Consequently, the Commission must allow an OVS operator to insist that those using its system have the ability to obtain programming on comparable, nondiscriminatory terms. Any other result will eviscerate the incentive to invest in the development of OVS (NYNEX 12-13).

Importantly, the preclusion of such discriminatory practices does not compel the broadcaster or programmer to surrender its property rights to either withhold or sell its program content to the OVS or CableCo systems (NPRM ¶ 41). Rather, it would simply ensure that discriminatory conduct on their part will not have a chilling and anticompetitive effect on new market entry, resulting in the frustration of Congress's goals "to promote competition, to encourage investment in new technologies and to

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[33] US West 20. A comparable rule applies to cable systems serving the same area 47 C.F.R. § 76.64 (g).

[34] HBO 23-24.

maximize consumer choice of services that best meet their information and entertainment needs."[35]

III. STATE AND LOCAL GOVERNMENTS MUST NOT INDIRECTLY IMPOSE FRANCHISE REQUIREMENTS THROUGH THE POWER TO REGULATE THE USE OF THE STREETS

NYNEX has shown that, in enacting Section 653, Congress evidenced an intention to occupy the field and to preempt any state or local government regulation of OVS (NYNEX 30-32). The National League of Cities ("NLC") argues, however, that any preemption of the right of local governments to regulate the use of the streets by OVS operators would constitute a "taking" in violation of the Fifth Amendment. Since this right to regulate the use of the streets allegedly gives local governments a stake in the provision of OVS service, the NLC urges the Commission to require OVS operators to show in their OVS certifications that they have obtained all necessary approvals from the local government.

NLC's concerns over Congress' preemption of local regulatory authority is groundless and its certification proposal is unnecessary.[36] No one has proposed to preclude local governments from exercising their right to control the use of streets and

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[35] Conference Report at 172. Similarly, the Congressional purpose would be frustrated if OVS was not afforded cable compulsory license rights (Baseball 4, n. 1). However, it is clear that open video systems satisfy the definition of "cable systems" under the cable compulsory license. 47 U.S.C. § 111 (f). Moreover, it is manifest that Congress intended that compulsory license to apply to open video systems when it subjected OVS to must carry and retransmission consent requirements. Compliance with those requirements is dependent on a compulsory license and Congress could not have intended to impose must carry/ retransmission consent obligations on OVS while denying it the means to comply.

[36] *See* National League of Cities, et al 52-73.

rights-of-way ("ROW") or from obtaining reasonable compensation for their use. Nothing in the Act or its legislative history indicates that Congress intended to preempt that right, and the Conference Report states that "an operator of an open video system . . . shall be subject, to the extent permissible under State and local law, to the authority of a local government to manage its rights of way in a nondiscriminatory and competitively neutral manner."[37] Further, nothing in the NPRM purports to limit local governments from exercising these powers. And, since Section 653(c)(2)(B) permits local franchise authorities to impose fees, there is no "taking" of property of the local governments.[38] On the contrary, this payment of franchise-like fees should be viewed to fully convey franchise-like rights of access equal to CableCos.

The Act does preclude, however, local governments from using their ROW power to regulate the streets as a pretext for imposing franchise-type requirements on open video systems. Local governments cannot use that power to require, for example, that OVS operators provide facilities, equipment or other benefits as a condition to using local streets, nor can they specify the program services the OVS operators must offer. Congress has made it unmistakably clear that it intended to "occupy the field" of open video regulation, leaving no room for state and local governments to supplement the

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[37] Conference Report at 178.

[38] The Texas Cities argue that franchise authorities should be permitted to assess fees based on the cable service revenues of all video programmers using the open video system. *See* Comments of the Texas Cities 16-17. However, Congress specifically limited fees to those based on "the gross revenues of the operator" (Section 653(c)(2)(B)). Of course, the OVS operator must be permitted to recover those fees in the charges for use of the system.

regulatory scheme (NYNEX 30-32). Thus, local governments should not be permitted to make an end run around the statute by wielding their authority over the streets as a subterfuge for extracting concessions from OVS operators.[39]

Local governments may thus only regulate activities of OVS operators relating to protection of the environment, health and safety, and they may receive just compensation for use of the streets and ROW.[40] Given this limited role for local governments, there is no need for the certification showing the NLC urges. Indeed, LECs have a long history of cooperating with local governments in this respect. Moreover, requiring OVS operators to obtain local government approvals before filing their OVS certifications would provide the OVS operator's competitors with an opportunity to delay entry. By setting a ten-day period for approval of a certification, Congress evidenced its distaste for the prolonged approval period involved with VDT and instructed the Commission to expedite action on certification requests. The NLC's proposal is inconsistent with that legislative directive.

IV. CONCLUSION

Congress provided for Open Video Systems in the 1996 Act to encourage competition in the video services market now dominated by incumbent CableCos in

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[39] In fact, NYNEX's telephone franchise covers the use of telephone plant to provide OVS service, contrary to the assertion of the National League of Cities. *See* NLC 67-69. However, telephone franchises are issued by the state or local governments pursuant to the state's police power and the scope of those franchises is a question of state law.

[40] LECs also currently pay local governments inter alia gross receipt and other taxes and assessments pursuant to their telephone franchise, and they frequently pay administrative fees related to ROW management (e.g., street opening permits) thereby compensating the local governments for the use of the streets.

each area. Fully aware of the fate that had befallen the Video Dial Tone concept, Congress freed OVS from the rigid structure of Title II regulation that doomed VDT. Title II does not, therefore, apply to OVS. In addition, Congress selected specific provisions of Title VI to apply to OVS in order to create a real opportunity for new wireline entrants to provide consumers with a competitive alternative to the entrenched cable monopolies. The remainder of Title VI requirements do not apply to OVS.

OVS is the Commission's best opportunity to encourage wireline video competition. The Commission should affirm and support that opportunity by declining the numerous proposals of commenters to establish extensive new regulatory rules, as set forth above. Only by doing so can the Commission fulfill Congress' overriding goal of establishing:

"a *pro-competitive, de-regulatory* national policy framework designed to accelerate rapidly *private sector deployment* of advanced telecommunications and information technologies and services to all Americans by opening *all telecommunications markets* to competition . . . ." (Conference Report at 113).

Respectfully submitted,

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